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Principled Remedial Discretion Under the Charter

Kent Roach

Principled Remedial Discretion Under the Charter

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The Supreme Court of Canada decided a number of cases in 2003 that confirmed the importance of remedial discretion under the Charter. The most well-known and controversial was *Doucet-Boudreau v. Nova Scotia (Minister of Education)*.[1] In that case, the Court upheld the discretion of a trial judge under section 24(1) of the *Canadian Charter of Rights and Freedoms*[2] to order that the government make best efforts to provide French language schools by certain times in various parts of Nova Scotia, and require the government to report back to the trial judge on its compliance with the order. The Court, however, was closely and firmly divided with four judges arguing in dissent that the trial judge had abused his discretion by violating the separation of powers; by acting after his jurisdiction had been exhausted; and by issuing a vague remedial order. *Doucet-Boudreau* may encourage trial judges to exercise supervisory jurisdiction in Charter cases and to order Charter remedies that are more specific than the general declarations that have generally been used in the past. But much will depend on how trial judges exercise this discretion in the future.

Doucet-Boudreau was not the only victory for the remedial discretion of trial judges. In *British Columbia (Minister of Forests) v. Okanagan Indian Band*,[3] the Supreme Court also made clear that trial judges have a discretion to order interim or advance costs in public interest litigation with a minority raising concerns that the Court had provided no real guidance as to how trial judges should exercise this expanded discretion. In addition, the Supreme Court was not above

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1 [2003] 3 S.C.R. 3, [2003] S.C.J. No. 63.

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

3 [2003] 3 S.C.R. 371, [2003] S.C.J. No. 76.

exercising some remedial discretion of its own in 2003. It suspended declarations of invalidity in three cases[4] but in only two of those cases did the Court attempt to apply the restrictive rules in *Schachter*[5] for suspending a declaration of invalidity. In a fourth case, *R. v. Powley*, it determined that there were no compelling reasons to extend a stay or period of suspension.[6]

The remedial cases decided by the Court this year provide a good vehicle for discussing the importance of remedial discretion under the Charter and the variety of approaches that can be taken to conceptualizing and governing the exercise of remedial discretion. In the first part of this paper, I will address the issue of remedial discretion at a general and conceptual level. I will argue that the remedial discretion of trial judges is a fundamental feature of the Charter and one that distinguishes it from the *Canadian Bill of Rights*.[7] The Charter embraces the common sense notion that rights will not be meaningful without remedies, but it also contemplates that remedial decision-making will be heavily dependent on context and the trial judge's exercise of discretion. I will then outline three different types of discretion that can be exercised by trial judges. The first is strong discretion, in the sense that it is or appears not to be governed either by rules or principles, especially those that are articulated and applied by appellate courts. A second kind of discretion is in part a reaction to the unconstrained freedom of pure discretion. It is a regime of ruled-based discretion in which the remedial discretion of trial judges is cabined by rules or pigeon holes enumerated by the appellate courts. A third form of discretion is principled remedial discretion which is not under-governed by law in the way of pure discretion or over-governed by self-executing categories and rules. Principled remedial discretion involves a judge applying general principles, such as the need for effective remedies and respect for institutional role, to the context of a particular violation.

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[4] *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835, [2003] S.C.J. No. 32; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, [2003] S.C.J. No. 54; *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, [2003] S.C.J. No. 37.

[5] *Schachter v. Canada*, [1992] 2 S.C.R. 679, [1992] S.C.J. No. 68.

[6] *R. v. Powley*, [2003] 2 S.C.R. 207, [2003] S.C.J. No. 43.

[7] S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

The three categories that I outline are evaluative, dynamic, and controversial. What one person sees as a principled test for the exercise of discretion can appear to another person to be overly constrained by rules and examples. For example, the three-part *Stillman*[8] test for the exclusion of evidence is criticized by many as being based on inflexible and unsound rules that fetter the trial judge's ability to balance the competing interests. At the same time, it can be defended as offering special protections for the accused's broad right against self-incrimination while allowing the trial judge to balance the seriousness of the violation against the adverse effects of excluding evidence in cases that do not threaten the fairness of trials. Similarly, there are disputes about the rule in *Rahey*[9] requiring a stay of proceedings as the minimal remedy for a violation of the right to a trial in a reasonable time under section 11(b) of the Charter. For some, it is an inflexible rule that can lead to unexpected consequences such as the *Askov* crisis, while to others it is a principled and purposive approach that recognizes the unfairness to the accused of requiring a trial after an unreasonable period of delay. In *Schachter v. Canada*,[10] Lamer C.J.C. for a majority of the Court stressed that section 1 analysis could provide helpful principles for deciding whether to extend underinclusive legislation by reading in, while La Forest J. expressed a concern that it could "encourage a mechanistic approach to the process, rather than encourage examination of more fundamental issues." A principled approach to remedial discretion forces judges to justify their remedial choices, but it can result in disagreements, as seen in the dissents in both *Stillman* and *Rahey*.

Recognizing the contingency of the categories, and especially the sometimes elusive distinction between inflexible rules and sound

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[8] *R. v. Stillman*, [1997] 1 S.C.R. 607, [1997] S.C.J. No. 34. Note that in *R. v. Buhay*, [2003] 1 S.C.R. 631, [2003] S.C.J. No. 30, the Court deferred to a trial judge's exercise of discretion to exclude unconstitutionally obtained evidence in order to avoid condoning a serious Charter violation.

[9] *R. v. Rahey*, [1987] 1 S.C.R. 588; [1987] S.C.J. No. 23. In *R. v. Taillefer* (*sub nom. R. v. Duguay*), [2003] 3 S.C.R. 307, at para. 121, [2003] S.C.J. No. 75, the Court indicated that a new trial would be the minimal remedy when the accused's right to full answer and defence had been violated by a disclosure violation. The Court indicated that a stay would be appropriate only in cases where a new trial would perpetuate "an injustice and would tarnish the integrity of our judicial system" by violating the "community's sense of fair play and decency." *Id*., at para. 128.

[10] *Supra* , note 5, at 729, para. 110.

principles, I will still argue that the remedial decisions of courts can be improved if judges recognize and attempt to avoid the dangers associated with both strong and rule-based discretion. Although there will be continued reasonable disagreement in the hardest of cases, remedial decision-making can be improved by avoiding the extremes of unfettered discretion and overly fettered discretion. Principled exercise of remedial discretion is not a recipe for agreement or even reliably right answers, but it is a recipe for fuller reflection and reasons as judges attempt to justify particular remedial decisions in relation to general principles relating to the appropriate role of the courts in ensuring that there are meaningful remedies for violations of Charter rights.

In the remaining parts of the paper, I will examine recent remedial decisions of the Supreme Court with the above categories in mind. My analysis of each case will attempt to recognize the range of debate about how the exercise of remedial discretion fits into the three categories of strong, rule-based, and principled discretion. At the same time, I will suggest some techniques that the courts might use to improve and sharpen their remedial decisions. Remedial decisions can usefully be evaluated on the basis of whether they escape the dangers of strong discretion by giving principled and purposive reasons and whether they escape the dangers of inflexible rules or pigeonholes by articulating the general principles that are relevant not only to the case at hand, but to other cases. This year's remedial cases present a particularly rich field to discuss many of the most difficult remedial decisions made under the Charter. In the end, I hope to provide some ideas that will help make the exercise of discretion to order injunctions and to retain jurisdiction over a case, to award advance costs, and to suspend a declaration of invalidity more principled and purposive.

I. Remedial Discretion under the Charter

1. The Importance of Remedial Discretion

Remedial discretion is an important feature of the Charter. Section 24 was placed in the Charter in no small part because Canadian courts

refused to exercise discretion under both the *Canadian Bill of Rights*[11] and the common law to award remedies such as the exclusion of improperly obtained evidence[12] or a stay of proceedings.[13] Remedial discretion is specifically provided in section 24(1) of the Charter, which contemplates such remedies being ordered "as the court considers appropriate and just." As McIntyre J. observed in *R. v. Mills*,[14] "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion." More recently, McLachlin C.J. has similarly observed that section 24(1) "appears to confer the widest possible discretion on a court to craft remedies for violations of *Charter* rights."[15]

On its face, section 52(1) of the *Constitution Act* mandates that unconstitutional laws will be struck down, but the reference to declaring such laws of no force and effect "to the extent of the inconsistency" introduces considerable discretion as to whether the appropriate remedy is a blanket declaration of invalidity or whether a less drastic remedy such as reading down, reading in, exemption, or severance would better accord with the purposes of the impugned legislation and the Charter.[16] Finally, the ability of courts to suspend a declaration of invalidity introduces another layer of discretion into the exercise of remedial decision-making under section 52(1).[17]

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[11] *R. v. Hogan*, [1975] 2 S.C.R. 574.

[12] *R. v. Wray*, [1971] S.C.R. 272.

[13] *R. v. Osborn*, [1971] S.C.R. 184.

[14] [1986] 1 S.C.R. 863, at 965, [1986] S.C.J. No. 39.

[15] *R. v. 974649 Ontario Inc.* [2001] 3 S.C.R. 575, at para. 18, [2001] S.C.J. No. 79.

[16] *Schachter v. Canada*, *supra*, note 5. On this jurisprudence, see my *Constitutional Remedies in Canada* (Aurora, Ont.: Canada Law Book, 2003) at ch. 14.

[17] Interestingly, the South African Constitution, which has borrowed from the Canadian experience of suspending declarations of invalidity, clearly contemplates considerable discretion in deciding whether to suspend a declaration of invalidity and in determining the terms on which the suspension will be made. See South Africa Constitution, s. 172(1), which provides:

> When deciding a constitutional matter within its power, a court —
>
> a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> b) may make any order that is just and equitable, including —

2. Types of Remedial Discretion

Although remedial discretion seems at one level to be an undeniable fact under the Charter, it is one that requires justification. The ambiguous nature of the trial judge's remedial discretion is demonstrated in the jurisprudence concerning appellate deference to issues of remedial choice. Appellate courts will not generally evaluate a remedy on a *de novo* basis. At the same time, they will intervene if the trial judge erred in setting out the relevant legal test, was clearly wrong, or gave reasons that were "so brief and conclusionary that it is difficult to say whether other errors were made."[18] This year, the Court has further emphasized the need for qualified appellate deference to a trial judge's exercise of remedial discretion. In *Buhay*,[19] the Court deferred to the trial judge's decision to exclude evidence under section 24(2) on the basis that it was not "unreasonable nor based upon an error or a misapprehension of the applicable law." In *Doucet-Boudreau*,[20] the majority emphasized that in evaluating section 24(1) remedies "[r]eviewing courts … must show considerable deference to trial judges' choice of remedy, and should refrain from using hindsight to perfect a remedy. A reviewing court should only interfere where the trial judge has committed an error of law or principle."

Recent debates among scholars of private law remedies about the degree to which equitable remedies are discretionary or rule-based may be helpful in clarifying the nature of remedial discretion, as well as the controversial nature of the enterprise. Professor Peter Birks has argued that remedial decision-making must be ruled-based in order to promote certainty in the law and accord with the ideal of the rule of law.[21]

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1) an order limiting the retrospective effect of the declaration of invalidity; and
2) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

[18] *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 84, [1997] S.C.J. No. 49.

[19] *Supra*, note 8, at para. 48.

[20] *Supra*, note 1, at para. 87.

[21] Peter Birks, "Rights, Wrongs and Remedies" (2000) 20 O.J.L.S. 1, at 36-37; Peter Birks, "Three Kinds of Objections to Discretionary Remedialism" (2000) 29 W. Aust. L. Rev. 1; Darryn Jenson, "The Rights and Wrongs of Discretionary Remedialism" (2003) Sing. J. of Legal Studies 178.

Others, however, defend so-called "discretionary remedialism"[22] on the basis of the impossibility of avoiding the need for judgment and flexibility in remedial decision-making. Although proponents of rule-based remedial decision-making raise the spectre of unfettered remedial decision-making, many of the advocates of discretionary remedialism support a more restrained and less positivistic form of discretion. They advocate what Ronald Dworkin describes as a "weak" form of discretion that is governed by legal principles as opposed to a "strong" form of discretion that applies "when a judge runs out of rules." Professor Dworkin sees principles as "standards that reasonable men can interpret in different ways"[23] and contrasts them with rules that, in his view, have a more self-executing or categorical nature. Multiple principles can be relevant to a judicial decision and must be weighed by the judges, whereas a legal rule as conceived by Dworkin either applies or does not. To be sure, Dworkin's distinctions between weak and strong forms of discretion and between rules and principles are controversial, and they may discount the need for interpretation in applying rules. Nevertheless, as will be seen, they provide a helpful guide to conceptualizing remedial discretion under the Charter.

(a) Strong Remedial Discretion

The idea of strong discretion is based on a positivistic sense that at some point the rules run out, and this gives the judge unconstrained freedom to make a decision by exercising discretion. Such a discretion seems anomalous in a legal regime committed to the rule of law and the protection of rights. Peter Birks, for example, has argued that "the whole point of the rule of law" is to avoid rule on the basis of "the wills and whims of a person or a group of people. The blessings of this commitment [to the rule of law] have been overlooked by the discretionary remedialists who suddenly suppose that the judges should be the one

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[22] Simon Evans, "Defending Discretionary Remedialism" (2001) 23 Sydney L. Rev. 463, at 480*ff*; Patricia Loughlan, "No Right to a Remedy? An Analysis of Judicial Discretion in the Imposition of Equitable Remedies" (1989) 17 Melb. L. Rev. 132.

[23] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), at 69, 34.

group answerable only to God."[24] To be sure, the idea of strong discretion sits uneasily with the ideals of the rule of law and the concept that where there is a right, there is a remedy.[25] At the same time, it is perhaps unfair to castigate strong discretion as simply a matter of will and whim. Remedial discretion is, at the end of the day, exercised by judges who are constrained by their institutional role to act in an impartial manner. A judge who exercises strong discretion is not necessarily immune from criticism that the discretion has been exercised unfairly or unwisely.[26]

As will be seen, there are some areas of constitutional remedies that at present seem to be exercised on the basis of strong discretion. Examples might include the discretion of a judge not to award an equitable remedy[27] or the discretion of a provincial superior court to decline jurisdiction in a case which could be heard by the Federal Court.[28] Some might also argue that suspended or delayed declarations of invalidity have become a matter of pure discretion as courts, including the Supreme Court, have ignored the restriction set out in *Schachter v. Canada*[29] on their use and have employed them in a wide variety of cases. Less controversially, the choice of the period for which the suspension will apply also seems to be a matter of pure or strong discretion. Sometimes the Supreme Court suspends a declaration of invalidity for 6 months, sometimes for 12 months, and sometimes for 18 months. In 2003, the Supreme Court suspended declarations of invalidity for a period of 12 months in two cases,[30] but for 6 months in a third case,[31]

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[24] Peter Birks, "Three Kinds of Objections to Discretionary Remedialism" *supra*, note 21, at 15.

[25] Professor Birks argues that "discretionary remedialism cannot allow the plaintiff to have rights. To make room for the discretion it has to reduce the plaintiff to a supplicant seeking the exercise if a discretion in his favour. He cannot be heard to demand rights." *Id.*, at 13.

[26] Dworkin, *Taking Rights Seriously*, *supra*, note 23, at 33.

[27] *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 195 D.L.R. (4th) 135, [2003] O.J. No. 4804 (C.A.), leave to appeal to S.C.C. refused (2001), 158 O.A.C. 199 (note). But for a discussion of the basis on which this discretion should be exercised and the need to relate the exercise of the discretion to legal principles, see my "Remedies in Aboriginal Litigations" in Magnet & Dorey, eds., *Aboriginal Rights Litigation* (Toronto: Butterworths, 2003), at 323-26.

[28] *Reza v. Canada (Minister of Employment & Immigration)*, [1994] 2 S.C.R. 394, [1994] S.C.J. No. 49.

[29] *Supra*, note 5.

[30] *Trociuk v. British Columbia (Attorney General)*, *supra*, note 4; *Figueroa v. Canada (Attorney General)*, *supra*, note 4.

with no rationale given to explain the difference. Generally, no reasons are given to explain the choice of time.[32] One of the hallmarks of pure discretion is that it need not be accompanied by reasons. Reasons are generally seen as means to relate a legal decision to some applicable rule or principle, and are superfluous when there are no such standards.

(b) Rule-Based Remedial Discretion

Rule-based discretion can be seen as an (over) reaction to the dangers of pure or strong discretion. The idea behind rule-based discretion is that appellate courts should formulate rules that will outline the circumstances in which trial judges should exercise their remedial discretion. Dworkin defines rules as "applicable in an all-or-nothing fashion." This means that "if the facts a rule stipulates are given" and the rule is validly on point then "the answer it supplies must be accepted."[33] His example of a rule is that a will must be witnessed by three persons to be valid. Dworkin may lean towards something of a caricature of rules, but as will be seen, there are some examples of courts taking such a seemingly categorical approach to issues of remedial discretion.

One value of rules is that they can promote certainty about the law, provided that it is clear what rule applies, and the judge is faithful to the result required by the rule. Unlike strong discretion, the application of rules also often invites and requires reasons from the judge. The reasons, however, will be focused on whether the conditions precedent to the rule apply or perhaps whether a conflicting rule applies. In some cases, reasoning about whether a rule applies will cause greater reflection about the purposes and principles that are at stake, but often reasons will end at the issue of whether the case at hand is sufficiently analogous to the cases contemplated by the rule that the rule should apply.

As will be seen, there are some areas of constitutional remedies that seem at present to be based on rules. One example would be the original rule in *Schachter*[34] which suggests that suspended or delayed declarations

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[31] *Nova Scotia (Workers' Compensation Board) v. Martin*, *supra*, note 4.

[32] But see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, [1999] S.C.J. No. 24 for an explanation of an 18-month delay.

[33] Dworkin, *Taking Rights Seriously*, *supra*, note 23, at 24.

[34] *Supra*, note 5.

of invalidity are extraordinary and should be reserved to cases in which an immediate declaration of invalidity would threaten the rule of law or public safety, or deprive someone of a benefit that is only unconstitutional in the sense that it is underinclusive. When courts apply this rule, they generally focus on whether the case at hand is analogous to the three categories presented by the rule in *Schachter*. As mentioned above, the *Stillman*[35] test for the exclusion of evidence can also be seen as rule-based in the sense that it requires the exclusion of evidence that satisfies the definition of conscriptive evidence, sometimes defined as statements and bodily substances obtained unconstitutionally from the accused. Again, reasons in such cases will usually focus on whether unconstitutionally obtained evidence in the particular case satisfies the definition of conscriptive evidence. If it does, it is excluded without much discussion of the underlying rationale or principle that explains or justifies the rule.[36]

Resistance to inflexible rules may produce a situation that gravitates towards strong discretion. The reason for this is that rules often focus on particular factual conditions precedent and not the underlying reasons why the conditions should have those consequences. Both strong discretion and rule-based discretion can be united by relative inattention to underlying principles. This may explain why the *Schachter* rules have been both unstable and unpredictable. Either judges determine whether the case at hand fits into the three examples provided by the Court, as did the Ontario Court of Appeal in the gay marriage case,[37] or the judge ignores the rule and decides, as a matter of strong discretion, and often without any real reasons, either to suspend or not suspend the declaration of invalidity.

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[35] *Supra*, note 8.

[36] For an argument that a definitional approach to conscriptive evidence can discount the importance of the underlying principle of whether the evidence was unobtained through an unfair process of self-incrimination see my *Constitutional Remedies in Canada*, *supra*, note 16, at 10.1210-10.1225, and my "Here We Go Again: Reviving the Real Evidence Distinction under Section 24(2)" (1999) 42 C.L.Q. 397.

[37] *Halpern v. Canada (Attorney General) (sub nom. Halpern v. Ontario; Halpern v. Toronto (City))* (2003), 225 D.L.R. (4th) 529, [2003] O.J. No. 2268 (C.A.).

(c) Principled Remedial Discretion

An alternative to either strong or rule-based remedial discretion is principled remedial discretion. Dworkin's account of principles suggests that they are more general and in some ways controversial than rules. Dworkin's theory is best known for its distinction between rights-based principles and collective policies and the demanding obligation to seek right answers in hard cases. What is perhaps less well-known is his sense that there are multiple principles and policies that can be considered in a particular case, and that judges must decide the weight of any principle in a particular case. Dworkin has a more modest description of principles, not as full-blown right answers, but as something "which officials must take into account, if it is relevant, as a consideration inclining in one direction or another." On this account, a judge is "required to assess all of the competing and conflicting principles" that bear on a case and "make a resolution of these principles rather than identifying one among others as 'valid'."[38] This account of multiple principles, though perhaps not entirely consistent with Dworkin's ultimate aspiration for a right answer through adjudication, allows for a more meaningful distinction between rule-based and principled remedial discretion. It opens up the space for judges to consider multiple principles — such as the need for an effective remedy and the need to respect the institutional role of the judiciary — when deciding questions of remedies without attempting to formulate particular rules about the circumstances in which one of these principles will have greater weight or when particular remedies should be ordered.

The idea that even the exercise of remedial discretion under the Charter can be principled is a compelling aspiration. It promises that something of the same methodology that is applied to determining the content of the rights and the justification of any limit on the right can also be applied to remedial decision-making. In this sense, it unites the process of determining rights and remedies. At the same time, it allows us to make sense of the fact that trial judges have a discretion to formulate appropriate and just remedies in particular circumstances.

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[38] Dworkin, *Taking Rights Seriously*, *supra*, note 23, at 26, 72.

There are some areas of constitutional remedies that gravitate towards a principled approach to Charter remedies. In *R. v. Gamble*,[39] Wilson J. stressed the connections between the process of interpreting rights and devising remedies when she stated that "[a] purposive approach should, in my view, be applied to the administration of *Charter* remedies as well as to the interpretation of *Charter* rights….*Charter* relief should not be denied or 'displaced by overly rigid rules'." At various junctures, the Supreme Court has stressed that remedies should vindicate the purposes of particular Charter rights. In *Osborne v. Canada*,[40] the Court expressed the importance of selecting a remedy that would vindicate the values of freedom of expression. In *Schachter v. Canada*,[41] the Court indicated that "[t]he absolute unavailability of reading in would mean that the standards developed under the *Charter* would have to be applied in certain cases in ways which would derogate from the deeper social purposes of the *Charter*." In that case, the Court took a principled approach to the remedial choice between reading in and a declaration of invalidity by basing it on the general principles of the need to respect the role of the legislature and the purposes of the Charter. To be sure, these general principles require further interpretation and application, but they provide a better and more general framework than the rule-based approach taken in *Schachter* to the separate question of when a declaration of invalidity should be suspended.

A principled approach to the exercise of remedial discretion might be impractical if it demanded that only one principle was relevant to any particular exercise of remedial discretion. Fortunately, it is easier to accept the idea of multiple and competing purposes and policies than it is multiple and competing rules. Once it is accepted that a principled approach can implicate more than one principle, it is possible to see the Court's frequent attention to the need to respect the proper role of legislatures, the executive and the judiciary, to balance competing interests, and to provide effective remedies as a principled approach to remedial decision-making.[42] A principled and purposive approach to the exercise

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[39] [1988] 2 S.C.R. 595, at 641, [1988] S.C.J. No. 87.

[40] [1991] 2 S.C.R. 69, [1991] S.C.J. No. 45.

[41] *Supra*, note 5, at 701.

[42] *Schachter v. Canada*, *id.*; *Mahe v. Alberta*, [1990] 1 S.C.R. 342. On the multiple purposes and principles that courts consider when ordering constitutional remedies, see my *Constitutional Remedies in Canada*, *supra*, note 16, at ch. 2.

of remedial discretion does not necessarily mean that the court will select the remedy that maximizes the relevant right in all cases. Rather it requires that judges consider all of the relevant and at times competing principles and attempt to order the best remedy possible. It also requires that judges attempt to justify their selection of remedies in a manner that fits with the general interpretative approach taken to determining the scope of rights and reasonable limits under the Charter.

3. Summary

The three approaches to the exercise of remedial discretion outlined above can be seen as a spectrum.

Rule *Principle* *Strong Discretion*

A rule-based and strong discretion approach are set at the opposite ends of the spectrum because they recognize the extremes of either control or freedom of the trial judge, but they also are united by their relevant neglect of the issue of general principles. As will be suggested below, a frequent reaction to the inflexibility of rule-based discretion is to exercise strong discretion by ignoring the rules. The spectrum approach is also helpful because it demonstrates that particular decisions may lie on the borderline of the categories. For example, a rule-based approach may lean towards principle to the extent that interpretation and application of the rules engages broader and more general questions about the purposes of the rules. A principled approach may lean towards strong discretion to the extent that it emphasizes appellate deference to the trial judge's choice of remedy.

In the remaining parts of this paper, I will examine some recent remedial decisions made by the Supreme Court. At first, I will describe the decision made by the Court and later I will evaluate the decision with reference to the above categories of strong, rule-based, and principled remedial discretion. In many cases, the question of whether the decision amounts to a principled and purposive approach to remedial decision-making could be the subject of reasonable disagreement. Nevertheless my hope is that remedial decision-making can be improved by attempting to avoid the excesses of, on the one hand, strong and unfettered discretion and, on the other hand, discretion that is mechanically guided by self-applying rules. At the same time, I recognize that multiple

principles are usually in play when a court fashions an appropriate and just remedy. Judges will have to use good judgment in order to reconcile these multiple and sometimes competing principles into a remedial decision that demonstrates awareness of all the relevant factors, and attempts to justify the exercise of remedial discretion in light of these factors.

II. *DOUCET-BOUDREAU* AND THE DISCRETION TO ORDER INJUNCTIONS AND RETAIN JURISDICTION

1. The Judgment

In the case of *Doucet-Boudreau*, the trial judge concluded that Nova Scotia had violated its requirement to provide minority language facilities in five regions of the province. The evidence suggested that between 1982 and 1997, the Department of Education had not accorded a priority to section 23 of the Charter or the assimilation of the Francophone minority when assessing priorities for new schools. The trial judge required that the respondents use their "best efforts" to comply with various deadlines in each of the regions and indicated that "[t]he Court shall retain jurisdiction to hear reports from the Respondents respecting the Respondents' compliance with this Order. The Respondents shall report to this Court on March 23, 2001 at 9:30 a.m., or on such other date as the Court may determine."[43] Several such reporting sessions were held in which the Department of Education, upon the judge's request, submitted affidavits detailing progress in school construction, and the other parties were also given an opportunity to adduce evidence.

The Crown appealed only the retention of jurisdiction in the case and in a 2:1 decision, the Nova Scotia Court of Appeal held that the trial judge had erred in retaining jurisdiction after he was *functus officio*. Justice of Appeal Flinn, for the majority, distinguished the *Manitoba Language Reference*[44] on the basis that the trial judge in this case had not left any issues, such as the deadlines for compliance, outstanding.

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[43] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, *supra*, note 1, at para. 7.

[44] *Reference re Language Rights Under S. 23 of Manitoba Act*, [1985] 1 S.C.R. 721, [1985] S.C.J. No. 36, in *Doucet-Boudreau v. Nova Scotia (Minister of Education*) (2001), 194 N.S.R. (2d) 323, [2001] N.S.J. No. 240 (C.A.).

He also stressed that there was no specific statutory authorization for the retention of jurisdiction, and expressed concerns that the trial judge acted as an administrator as opposed to a judge at the reporting sessions and that this may strain "harmonious relations"[45] between the judicial and other branches of government. Justice of Appeal Freeman in dissent would have upheld the trial judge's exercise of remedial discretion, concluding that it was a "creative blending of declaratory and injunctive relief with a means of mediation."[46] In his view, the trial judge's remedy had the practical benefit of allowing a judge familiar with the issues to "expedite implementation of the order in a variety of ways, not least of which being provision of a means of mediating disputes inevitable in carrying out the complex requirements of the order."[47]

The Supreme Court decided 5:4 to uphold the trial judge's remedy. Justices Iacobucci and Arbour, for the majority, stressed the important role of provincial superior courts and their inherent jurisdiction to award remedies, a power that "cannot be strictly limited by statutes or rules of the common law."[48] This power was not, however, absolute or unreviewable because it "must be read in harmony with the rest of our Constitution."[49] To this end, a remedy should be effective and meaningful having regard to the right and its violation; it "must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary";[50] it must call on "the function and powers of the court";[51] and finally, it must also be "fair to the party against whom the order is made."[52] The Court concluded that the trial judge's remedy was designed to prevent further procedural delay in vindicating rights long denied to the minority. The Court also noted that the remedy respected the role of the different institutions because it left the "detailed choices of means largely to the executive."[53] Although more

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[45] *Doucet-Boudreau*, *id.*, at paras. 50-52.

[46] *Id.*, at para. 70.

[47] *Id.*, at para. 62. On the important role of mediation in cases of ongoing structural relief, see Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281.

[48] *Supra*, note 1, at para. 51.

[49] *Id.*, at para. 50.

[50] *Id.*, at para. 56.

[51] *Id.*, at para. 57.

[52] *Id.*, at para. 58.

[53] *Id.*, at para. 69.

precision may have been desirable, the remedy was not fundamentally unfair to the government because it was not unduly vague and it could be appealed. Finally, the majority stressed that appellate courts "must show considerable deference to trial judges' choice of remedy, and should refrain from using hindsight to perfect a remedy. A reviewing court should only interfere where the trial judge has committed an error of law or principle."[54]

In a judgment by LeBel and Deschamps JJ., the minority of the Court concluded that the trial judge had erred by breaching the separation of powers; by retaining jurisdiction after he was *functus*; and by making an order that was so vague as to be procedurally unfair. Specifically, the minority held that if the trial judge was prepared to make further orders at the reporting session, he violated the separation of powers by entering into the realm of "administrative supervision and decision making."[55] It stressed that such a managerial role did not accord with the institutional capabilities of the judiciary or with "the Canadian tradition of mutual respect between the judiciary and the institutions that are the repository of democratic will."[56] If anything, the minority was even more critical of what the trial judge did if, as accepted by the majority of the Court, he was only holding reporting sessions and not contemplating additions or amendments to his original order. In that case, LeBel and Deschamps JJ., asserted that the trial judge was acting in a "political"[57] manner akin to the pressure that an opposition party places on a government. Instead of the reporting sessions, which they argued contemplated "an inappropriate, ongoing supervisory and investigative role,"[58] the trial judge should have waited for the applicants to have commenced an application for contempt of court for violating his remedial order. The availability of the contempt sanction in the minority's view ensured that the trial judge's remedy would have been effective without the retention of jurisdiction or the reporting requirement.

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[54] *Id.*, at para. 87.
[55] *Id.*, at para. 125.
[56] *Id.*, at para. 125.
[57] *Id.*, at para. 128.
[58] *Id.*, at para. 136.

2. The Judgment and the Three Models of Discretion

Doucet-Boudreau is an interesting and important case in no small part because both the majority and the minority focus on many of the important issues of principle that animate the exercise of remedial discretion under the Charter. For the majority, the principle with the greatest weight was the need to provide a remedy that was effective and meaningful for the applicants. They advocated a purposive approach to remedies that

> requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft *responsive* remedies. Second, the purpose of the remedies provision must be promoted: courts must craft *effective* remedies.[59]

The idea that remedies must be responsive and effective are broad goals or principles; they do not produce self-executing results in the manner of rules. The majority's focus on the right being protected and the context of the violation also explains why it spends considerably more time than the minority judgment in discussing the purposes of section 23 of the Charter and the particular nature of the violation caused by continued governmental neglect of the right to minority language education.

The majority did not view the principle of full and effective remedies as the only principle at stake in exercising remedial discretion under section 24(1) of the Charter. The competing principles can be grouped into two categories. The first is the need to respect the proper relationship with other parts of government with the concomitant concern of ensuring that the remedy remains suited to the judicial function. It is significant to the majority that the trial judge was exercising the constitutionally protected jurisdiction of a provincial superior court. Justices Iacobucci and Arbour concluded that statutory and common law rules limiting the remedial powers of courts, as well as the jurisprudence that determines whether inferior tribunals have jurisdiction over a remedy requested under section 24(1) of the Charter, do not apply to the exercise of discretion by provincial superior courts under section 24(1) of the Charter.[60] The majority takes much less of a rule-based approach

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[59] *Id.*, at para. 25.
[60] *Id.*, at paras. 48, 51.

than the minority to the question of whether the remedy is compatible with the separation of powers. It warns that there is no "bright line" separating judicial, executive, and legislative "functions in all cases."[61] The restraint of requiring a judicial remedy means not that courts may never exercise a legislative or administrative function, but rather that "[i]t will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited."[62] The majority signals that the principle of effective and responsive remedies will have greater weight than the principle of respecting institutional roles when it makes the evocative statement that "[d]eference ends … where the constitutional rights that the courts are charged with protecting begin."[63]

The second competing principle is that constitutional remedies must be fair to the government. The majority seems to concede that the trial judge's remedy could have been fairer to the government had it been more specific about what was required. It indicates that the parties could have been given more guidance as to what would happen at the reporting session, and a specified timetable. In the end, however, the majority concludes that "reporting order was not vaguely worded so as to render it invalid."[64] In reaching this conclusion, the majority relies heavily on the concept of appellate deference to the discretion of a trial judge who is "not required to identify the single best remedy, even if that were possible."[65] An emphasis on appellate deference, and especially the idea that even the trial judge does not have a duty to seek the best remedy possible, moves from the realm of principled remedial discretion in the direction of strong discretion.

The majority's decision on the fairness point could in my view have been improved by more focus on context, principle, and alternative remedies. The remedial environment was complex and dynamic because it involved five different school regions in the province, and a new government had just come into power. Given the minority's extraordinary criticism of their colleagues as sanctioning a "political" remedy, I hasten to add that the change of government is not relevant in a partisan politi-

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61 *Id.*, at para. 56.
62 *Id.*, at para. 57.
63 *Id.*, at para. 36.
64 *Id.*, at para. 83.
65 *Id.*, at para. 86.

cal sense, but because of functional concerns about delays that can result from power transitions. The majority also underestimates that the trial judge did indeed establish target deadlines for the construction of French language schools in all five regions. The fairness of the trial judge's remedy is in my view best revealed by the fact that the reporting sessions were an alternative to waiting until a deadline had been missed and then holding a contempt hearing. The government and its officials were not in jeopardy at the reporting sessions of being found in contempt and this speaks to the fairness of the less-structured procedure used by the trial judge. In general, remedies will be better justified by consideration of the relevant principles and contexts and not by reliance on appellate deference. Although appellate courts should recognize that there may be a range of reasonable remedial choices that can be made without error, they should not send a signal to trial judges that they are not obliged to attempt, however difficult that may be, to devise the "single best remedy." Remedial discretion under the Charter should not be conceived of a matter in which a judge "has no duty to decide one way or the other, but rather a permission … to decide either way."[66]

On the spectrum of discretion outlined in the first part of this paper, the majority roots itself in principle, but leans more toward strong than to ruled-based discretion. When appellate courts consider remedial decision-making, it may well be best for them to err on the side of strong rather than rule-based discretion because of the unforeseen circumstances that may be encountered by trial judges and the comparative advantages that trial judges have in devising remedies because of their familiarity with all the evidence, the parties, and local circumstances.[67] As suggested above, however, this should not be taken as an endorsement of strong discretion by trial judges and it does not relieve trial judges of their obligation to consider all the relevant legal principles and give full reasons to explain their decisions. Trial judges should aim at ordering the best remedy and one that is supported by consideration and weighing of the relevant purposes and principles.

The minority in *Doucet-Boudreau*, like the majority, focuses on the principles of effective remedies, respect for the separation of powers,

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[66] Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), at 122.

[67] *R. v. Buhay*, *supra*, note 8.

and procedural fairness in its evaluation of the trial judge's remedy. Although there is obvious disagreement about the contours and weight of these principles among the nine judges, it is a positive sign of the growing maturity of remedial jurisprudence that all nine judges agree that the remedy should be evaluated in relation to the same broad principles.

The minority gives considerably less weight than the majority to the principle of effective and meaningful remedies. The judgment of LeBel and Deschamps JJ. starts with the declaration that "the devil is in the details" and proceeds through a discussion of the drafting of the order in relation to the principle of procedural fairness, and various restraints on the appropriate role of the judiciary including the doctrine of *functus officio*. The issue of the effectiveness of the trial judge's remedy is addressed only towards the end of their judgment where they assert that "[i]f the claimants felt that the government was not complying with any part of the order, then they could have brought an application for contempt."[68] One problem with reliance on the possibility of contempt applications to ensure an effective remedy is, on the facts of the case, it is not clear that they were available. There was some ambiguity about whether the trial judge's remedy constituted a declaration or an injunction. Moreover as the majority conceded and as the minority itself stressed, there was some concern about the vagueness of the "best efforts" order. In *Little Sisters*,[69] the majority of the Court emphasized the need for precision should injunctions, including structural injunctions, be used. Given the need for a clear order and breach of that order before a person or an organization can fairly be found in contempt of court, it is doubtful that the trial judge's remedy could actually have been enforced through contempt. If the trial judge's order was too vague to be enforced through contempt, then it is illogical and unconvincing for the minority to claim that the availability of contempt would have made the trial judge's order effective without the reporting requirements. In any event, the minority in my view did not devote sufficient attention to the fundamental principle that constitutional remedies must be effective and meaningful.

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[68] *Id.*, at paras. 91, 136, 143.

[69] *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, [2000] S.C.J. No. 66.

The minority's discussion of the principle of the separation of powers and limits of judicial power leans heavily in the direction of a rule that would preclude the use of supervisory jurisdiction and structural injunctions. This conclusion is surprising given that two of the four judges in the minority — Major and Binnie JJ. — seemed in Binnie J.'s majority judgment in *Little Sisters v. Canada*[70] to leave open the possibility that structural injunctions may be "helpful" in the appropriate case. In *Doucet-Boudreau*, the minority comes quite close to articulating a rule that would prohibit such structural relief when it stated:

> In our view, if a court intervenes, as here, in matters of administration properly entrusted to the executive, it exceeds its proper sphere and thereby breaches the separation of powers. By crossing the boundary between judicial acts and administrative oversight, it acts illegitimately and without jurisdiction. Such a crossing of the boundary cannot be characterized as relief that is "appropriate and just in the circumstances" within the meaning of section 24(1) of the *Charter*.
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> …
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> By purporting to be able to make subsequent orders, the trial judge would have assumed a supervisory role which included administrative functions that properly lie in the sphere of the executive. These functions are beyond the capacities of courts.
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> …
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> the executive should after a judicial finding of a breach, retain autonomy in administering government policy that conforms with the *Charter*.[71]

To be sure this conclusion is rooted in the minority's interpretation of an important principle, namely the separation of powers and the limits of the judicial function. In some other parts of the judgment this idea is also hedged in by qualifiers such as the statement that "courts should, *as a general rule*, avoid interfering in the management of public

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[70] *Id.*, at para. 158.

[71] *Doucet-Boudreau*, *supra*, note 1, at paras. 117, 120, 124.

administration."[72] Nevertheless, the minority judgment leans towards an absolute rule against structural injunctions.

Some principles may be strong enough to justify an absolute rule, but in many other contexts, the Court has been shy about articulating any absolute rule. For example, the Court has even refused to articulate an absolute rule that extradition to face the death penalty or deportation to face torture will violate the Constitution.[73] Given this, can the more or less absolute rule proposed by the minority against structural injunctions be justified? In my view, it cannot. As discussed above, the minority gives inadequate weight to the principle of effective remedies and assumes that contempt citations will be sufficient to ensure government compliance with any court order. One problem with this assumption is that it discounts the inherently complex and polycentric nature of public law litigation. The minority operates on the assumption that a failure to comply with a court order will be the result of deliberate disobedience that can be cured by fining the government or jailing the responsible officials for contempt. The problem is that a failure to comply with constitutional standards can be caused by a wide range of factors including incompetence and unforeseen circumstances. For example, what would have happened to the deadlines in the trial judge's order if there had been a major public sector or construction strike in Nova Scotia? In such circumstances it would have been unfair to have fined the government or its officials for factors outside their control. It would, however, have been appropriate and just for the trial judge to revisit the order in light of the changed circumstances and to have issued revised and supplementary orders. The Supreme Court has itself issued such supplementary orders in response to new information about the difficulties of translating Manitoba's laws into French.[74] It has also extended transition periods or periods of a suspended declaration of invalidity in light of

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[72] *Id.*, at para. 110 (emphasis added).

[73] *United States v. Burns*, [2001] 1 S.C.R. 283, [2001] S.C.J. No. 8; *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, [2002] S.C.J. No. 3.

[74] *Reference re Language Rights Under S. 23 of Manitoba Act*, [1985] 1 S.C.R. 721, [1985] S.C.J. No. 36, supp. reasons [1985] 2 S.C.R. 347, [1985] S.C.J. No. 70, supp. reasons [1990] 3 S.C.R. 1417, [1990] S.C.J. No. 142, supp. reasons [1992] 1 S.C.R. 212, [1992] S.C.J. No. 2.

changed circumstances.[75] The minority does not deal adequately with this experience and ignores the analogous supervisory jurisdiction exercised by the court in a range of private law matters, a point that the majority stresses.[76] The minority's decision is based on a narrow and absolute understanding of the separation of powers that does not fit either previous constitutional cases or the traditional role of courts of equity.

Another factor that undermines the minority judgment is that it does not consider how other principles may affect its rule against the retention of supervisory jurisdiction and structural injunctions. As discussed above, such a rule sits uneasily with the principle of effective and responsive remedies. In addition, it sits uneasily with the concern about preserving a proper relationship between courts and governments. As the majority notes, the alternative remedy relied upon by the minority, the contempt citation, is in tension with the traditional relationship between Canadian courts and governments. Reliance on contempt citations could cause greater harm to the relationship between courts and governments than the retention of jurisdiction and the conduct of reporting sessions.

The minority's opinion well demonstrates a weakness of a rule-based approach. Once a rule applies, it is self-executing without attention to competing rules or principles. In contrast, as Dworkin suggests, a principled approach will lend itself more easily to judicial consideration of competing principles and policies. Again, reasonable people may disagree about the respective weight attached to the competing principles, but a judicial opinion will be more persuasive and have greater

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[75] *Reference re Provincial Court Act*, [1997] 3 S.C.R. 3, [1997] S.C.J. No. 75, supp. reasons [1998] 1 S.C.R. 3, [1998] S.C.J. No. 10, supp. reasons [1998] 2 S.C.R. 443, [1998] S.C.J. No. 92; *R. v . Feeney*, [1997] 2 S.C.R. 13, [1997] S.C.J. No. 49, supp. reasons [1997] 2 S.C.R. 117, [1997] S.C.J. No. 80, supp. reasons [1997] 3 S.C.R. 1008, [1997] S.C.J. No. 114; *R. v. Cobham*, [1994] 3 S.C.R. 360, [1994] S.C.J. No. 76. On the considerable confusion caused by these cases, see Sujit Choudhry & Kent Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003) 21 Sup. Ct. L. Rev. (2d) 205, at 214-25.

[76] As Iacobucci and Arbour JJ. noted, in various contexts including bankruptcy, trusts and estates, and family law, "courts order remedies that involve their continuing involvement in the relations between the parties. Superior courts, which under the Judicature Acts, possess the powers of common law courts and courts of equity, have 'assumed active and even managerial roles in the exercise of their traditional equitable powers'." *Doucet-Boudreau*, *supra*, note 1, at para. 71 (citations omitted).

legitimacy if it appears to have considered all of the relevant competing principles. In my view, the minority's opinion leans excessively towards a rule against judicial supervision without adequate consideration of how such a rule will affect the principles of effective and meaningful remedies or the maintenance of a proper relation between the court and governments.

In the end, it is a positive sign that all the judges in *Doucet-Boudreau* root their decisions in the principles of effective remedies, respect for institutional role, and procedural fairness. Moreover it should not be surprising that reasonable people will disagree about the application of these principles or the proper weight to be given to them. The majority's opinion could have been improved by curbing a tendency to move in the direction of strong discretion. Although there is a need for appellate courts to defer to a trial judge's ability to determine what remedy is appropriate and just in all the circumstances, care should be taken not to suggest that trial judges do not have a legal duty both to consider all the relevant principles and to search for the best remedy. At the same time, the minority opinion moves even more than the majority judgment away from a focus on the relevant remedial principles. The minority strays not toward strong discretion, but rather in the direction of rule-based discretion. Justices LeBel and Deschamps came very close to articulating an absolute rule that would preclude trial judges from retaining supervisory jurisdiction and issuing structural injunctions. This absolute rule does not fit with the remedial experience in both public and private law including cases such as the *Manitoba Language Reference*[77] in which the Supreme Court itself has retained jurisdiction and modified its own orders. It also does not fit with the comparable experience of not only the United States, but many other countries including India and South Africa, which have recognized the legitimacy of courts retaining supervisory jurisdiction in constitutional cases.[78] Most impor-

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[77] *Supra*, note 74.

[78] The South African Constitutional Court, after reviewing American, Indian, German, Canadian, and British law, concluded: "Where a breach of any right has taken place, including a socio-economic right, a Court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a *mandamus* and the exercise of supervisory jurisdiction." *Minister of Health v. Treatment Action Campaign (No. 2)*, 2002 5 SA 721, at 758, [2002] S.A.J. No. 48.

tantly, from the perspective of the search for a principled approach to the exercise of remedial discretion, an absolute rule against structural injunctions pays inadequate attention to the principle of the need for effective remedies.

III. *OKANAGAN INDIAN BAND* AND THE DISCRETION TO AWARD ADVANCE COSTS

1. The Judgment

In *British Columbia (Minister of Forests) v. Okanagan Indian Band*,[79] Aboriginal bands applied to a judge of the British Columbia Supreme Court for an order of advance or interim costs. They wished to argue that orders to stop them from logging violated their Aboriginal title to the land and the right to log on the land, as authorized by their tribal councils. The trial judge found that he had "a limited discretion in appropriate circumstances to award interim costs" but this case "falls far outside that area" in large part because of the risk of prejudging the complex case which required a trial.[80] He rejected arguments that section 35 of the *Constitution Act, 1982* or a fiduciary duty approach required the award of advance costs. He expressed sympathy for the plight of the impoverished bands who faced possible legal bills close to $1 million, and the hope that governments would supply funding or counsel might take the case on a contingency basis.

The British Columbia Court of Appeal allowed the appeal on the basis that the trial judge had misjudged the nature of his discretion to award advance costs and in particular had over-emphasized the danger of prejudging the case. The Court of Appeal agreed with the trial judge that there was no section 35 Aboriginal right or fiduciary duty that required the payment of advance costs. At the same time, the Court of Appeal indicated that these considerations were important background factors that supported its conclusion that there were exceptional circumstances to justify the order of advance costs.[81]

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[79] *Supra*, note 3.

[80] *British Columbia (Minister of Forests) v. Wilson*, [2000] B.C.J. No. 1536, at para. 129.

[81] (2001), 208 D.L.R. (4th) 301, at paras. 29, 37, [2001] B.C.J. No. 2279 (C.A.).

The Supreme Court upheld the Court of Appeal's order for advance costs in a 6:3 decision. Justice LeBel, for the majority, related the present law on advance costs in family, trust, bankruptcy, and corporate cases to a general principle, namely the need "to avoid unfairness by enabling impecunious litigants to pursue meritorious claims with which they would not otherwise be able to proceed."[82] He also examined how this principle would be applied to public interest litigation. To this end, he took notice of how courts in some Charter cases have departed from the normal rule of costs following the event and have even on occasion awarded costs to an unsuccessful Charter applicant.[83]

Justice LeBel formulated three conditions that should be present for an award of interim costs in public interest litigation, namely:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
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> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.[84]

He indicated that satisfaction of these three criteria would not automatically justify the award of advance costs. Trial judges still had a discretion not to order advance costs. Justice LeBel provided some guidance for how this discretion should be exercised when he indicated that care should be taken not to impose "an unfair burden" on "private litigants who may, in some ways, be caught in the crossfire of disputes

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[82] *Supra*, note 3, at paras. 34, 36.

[83] *Schachter v. Canada*, *supra*, note 5; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, [1994] S.C.J. No. 24. In *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, [2003] S.C.J. No. 74, at para. 76, the plaintiffs were held not to be "public interest litigants" for the purposes of cost awards because they were "seeking several millions of dollars in damages."

[84] *Okanagan Indian Band*, *supra*, note 3, at para. 40.

which, essentially, involve the relationship between the claimants and certain public authorities, or the effect of laws of general application."[85]

The majority stressed that appellate courts should defer to the trial judge's exercise of discretion unless it was based on legal error or "a palpable error" in factual assessment.[86] In this case, the trial judge had so erred by placing too much emphasis on a concern that advance costs would create an appearance of prejudgment, and in concluding that alternative forms of funding such as contingency fees were viable in the circumstances. The Supreme Court determined that the advance costs awarded by the Court of Appeal were appropriate.[87]

Justice Major wrote the dissent with the concurrence of Iacobucci and Bastarache JJ. He stressed the existing common law rules that advance costs only would be awarded in marital, corporate, and trusts case. He related these cases to "a presumption that the property that is the subject of the dispute is to be shared in some way" and that a party who receives an advance cost order "will win some award from the other party."[88] This principle was much more narrowly conceived than that of the majority and seems to merge with an even narrower rule based on the examples of when advance costs have previously been ordered under the common law. Justice Major also indicated that the trial judge was correct to be concerned about prejudging the case and "one may not presume that the Bands will establish even partial aboriginal title in the cases under appeal."[89] Finally, he concluded that "the honour of the Crown is not at stake in this appeal" in part because "no right under section 35 of the *Constitution Act, 1982* is implicated and the matter involves the provincial Crown rather than the federal Crown…."[90]

Justice Major criticized the majority for sanctioning what has been described in the first part of this article as a strong discretion in trial judges to award advance costs. He warned that there was not "any ascertainable standard or direction" for deciding when a public interest case was "special enough" to merit an award of advance costs. He argued

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[85] *Id.*, at para. 41.
[86] *Id.*, at para. 43.
[87] *Id.*, at para. 46.
[88] *Id.*, at paras 74 and 77.
[89] *Id.*, at para. 76.
[90] *Id.*, at paras. 68, 73.

that appeals to the justice of the case were so vague that "[a] trial judge can draw no direction from this proposal."[91] In his view, concerns about access to justice should be left to legislative reform.

2. The Judgment and the Three Models of Discretion

Although it sets out three requirements for the order of advance costs, the majority judgment in *Okanagan Indian Band* seems to avoid a strict rule-based approach to the exercise of the discretion. The three criteria required by the majority all relate to the overall principle of access to justice that seems to lie at the root of the case. In other words, access to justice would not be advanced if interim costs were ordered when the litigation could occur without such orders, or if the claim was frivolous or only of importance to the parties themselves. The majority's opinion could have been improved by more examination of the nature of the applicant's claims. Even if section 35 of the *Constitution Act, 1982* or section 15 of the Charter do not require interim costs as a matter of right, they may provide important background support or "constitutional hints"[92] that could help justify the award. The minority addresses the section 35 question, but is pre-emptory in concluding that the honour of the Crown is not engaged in this case and in error in asserting that there can be no fiduciary relationship between the provincial Crown and Aboriginal peoples.[93] An important way of making the exercise of discretion more principled is for courts to pay attention to the purposes of the constitution. For example, the Court indicated in *Schachter v. Canada*[94] that the purposes of the Charter, particularly section 15, may support a reading in remedy in some cases. The majority's opinion in *Okanagan Indian Band* could have been improved by more attention to the underlying rights at stake as a means to give content its laudatory concern with facilitating access to justice.

One reason why LeBel J. may not have paid more attention to the merits of the applicant's claim to Aboriginal title may have been a

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[91] *Id.*, at paras. 65-66.

[92] Nitya Duclos & Kent Roach, "Constitutional Remedies as Constitutional Hints: A Comment on *The Queen v. Schachter*" (1991) 36 McGill L.J. 1.

[93] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1997] S.C.J. No. 108.

[94] *Supra*, note 5.

concern about prejudging the merits, concerns that were stressed by both the trial judge and Major J. in his dissent. This can be related to the general concern about procedural fairness accepted as a relevant principle by both the majority and the minority in *Doucet-Boudreau*. Justice LeBel's examination of the policy purposes of cost awards in general and the special nature of costs in public interest litigation, however, provides some answers to these concerns. As Justice LeBel points out, there is a growing recognition that costs are not mechanically or invariably tied to the cause, and that there may be many legitimate reasons why a losing public interest litigant should not have to pay costs to a successful governmental litigant (and in some cases may even be entitled to costs). In addition, Justice LeBel's direction that judges address the danger of private litigants being unfairly burdened with interim costs also suggests that it will often be equitable to place such burdens on governments who are in the best position to distribute the costs of access to justice. More explicit discussion of such considerations should allow a judge who awards interim costs in a public interest case to stress the importance of allowing the claim to be heard regardless of whether at the end of the day the claim is successful.

The fear that advance costs will unfairly prejudge the case against the government can also be addressed by examining the principles that guide judges when exercising their discretion to grant public interest standing or hear moot cases.[95] The emphasis in such cases is on the importance of a decision on the merits, and not on whether the court's preliminary procedural decision prejudges the merits or prejudices the governmental defendants. Courts make sure that a constitutional claim is serious and has some merit before exercising their discretion, but this does not mean that the claim is valid. Indeed, the parties in a number of cases in which public interest standing has been granted have turned out to be losers on the merits. In public interest standing cases, like advance costs cases, courts ask themselves whether there is an alternative way that the issue raised in the case can be litigated. An important principle in both the public interest standing and mootness cases is that the actions of governments should not be immunized from review. A similar

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[95] The leading cases are *Canada (Minister of Justice) v. Finlay*, [1986] 2 S.C.R. 607, [1986] S.C.J. No. 73; and *Borowski v. Canada (Attorney General)*\, [1989] 1 S.C.R. 342, [1989] S.C.J. No. 14.

principle informs the discretion to award advance costs. When deciding whether to exercise discretion to grant public interest standing, award advance costs, or decide a moot case, there is a common focus on the benefit of a decision on the merits to the public at large as opposed to the particular litigant. Although the minority criticizes the court for recognizing an open-ended discretion to award advance costs, there is no reason to think that a manageable and principled jurisprudence cannot develop around advance costs, in much the same way as it has developed around the discretion to grant public interest standing or decide moot cases.

A number of strategies are available to make the exercise of the discretion to award interim costs more principled. As suggested above, more attention could be paid to the importance of the rights claimed by the impecunious party. As with public interest standing and mootness, the emphasis should be on the importance of hearing and deciding such claims rather than on the question of whether the claims will in fact succeed at trial. Justice LeBel emphasized that the presence of the three criteria does not require a judge to award interim costs. Taken by itself such a residual discretion would lend support to the minority's concern that the Court has recognized a strong and unguided discretion. At the same time, Justice LeBel helpfully provided some guidance about how the residual discretion should be exercised by raising concerns about imposing unfair burdens on private litigants. This concern reaffirms the value of allowing impecunious litigants to make serious claims against governments. Another helpful factor is for the majority to stress the importance of the trial judge giving full reasons to justify the decision whether or not to award interim costs.[96] A requirement for full reasons can help ensure that principles will develop over time to guide the exercise of discretion, and that the discretion does not degenerate into a strong form of discretion that can be exercised without reasons.

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[96] A requirement for reasons seems to be implicit in Justice LeBel's statement that "discretionary decisions are not completely insulated from review. An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts … the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review." *British Columbia v. Okanagan Indian Band*, *supra*, note 3, at para. 43.

An emphasis on appellate deference to the exercise of discretion can produce a situation in which the discretion becomes a strong form of discretion that is resistant not only to appellate review but the application of legal principles. For example, the majority of the British Columbia Court of Appeal in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*[97] upheld the award of "symbolic damages" of $20,000 to parents who had established that their rights under section 15 of the Charter had been denied by the government's refusal to provide intensive behavioural therapy for their autistic children. Justice of Appeal Saunders stressed the breadth of the trial judge's remedial discretion, even hinting that no damages might have been an appropriate remedy because the government may have had a good faith immunity. The result of this decision was that very little guidance was given to trial judges and litigants concerning the still underdeveloped nature of the Charter damage claim. It was not clear what, if any, degree of fault was necessary to justify damages and how damages, including damages for the violation of the constitutional right itself, should be calculated. In contrast, Lambert J.A. in his dissent took a more principled approach in that he attempted to outline the fault level required for damages under section 24(1) of the Charter and the appropriate method of calculating damages. To this end, he stressed that the Supreme Court's 1997 decision in *Eldridge v. British Columbia*[98] should have alerted the government to the merit of the claim and that damages should be available for "the losses suffered by the adult petitioners in the period when those losses were attributable to the recalcitrance or inertia of the Crown in the face of the *Eldridge* case and the commencement of these proceedings."[99]

Reasonable people might disagree with Lambert J.A.'s dissent, but that is the point. His decision, unlike that of the majority, articulates principles that can be debated and which can guide the exercise of remedial discretion. For example, some might argue along with the petitioners, that damages should be available for even earlier losses in order to compensate all of the damages attributable to the section 15

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[97] (2002), 220 D.L.R. (4th) 411, [2002] B.C.J. No. 2258 (C.A.), leave to appeal to S.C.C. granted (2003), 224 D.L.R. (4th) vi.

[98] [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86.

[99] *Auton*, *supra*, note 97, at para. 138.

damages.[100] Others might argue that the government acted in good faith and should not have to pay any damages or pay only damages from the date of the trial judgment, making clear what section 15 of the Charter entailed in terms of health care for autistic children.[101] These are difficult issues that ideally will be addressed when the Supreme Court delivers its judgment in this case. My point is only that reliance on the concept of appellate deference to the trial judge's discretion may produce a situation in which courts fail to outline the principles that should guide decisions to award either interim costs or Charter damages.

In his dissent in *Okanagan Indian Band*, Major J. rejected the idea that access to justice should be an animating principle for the exercise of the discretion to award interim costs. He argued that this would constitute a radical departure from the treatment of advance costs under the common law and that it addresses questions best left for the legislature. Despite the fact that Major J. is the only constant, there are remarkable similarities between the approaches taken by the dissenters in *Okanagan Indian Band* and *Doucet-Boudreau*. Both dissents rely on the existing common law much more than the majority. The focus on common law concepts, such as the *functus* doctrine in *Doucet-Boudreau* and the common law jurisprudence on advance costs in *Okanagan*, leave the dissenters in both cases vulnerable to criticisms that they are discounting the importance of the public and constitutional law context. Both dissents take the position that courts are ill-suited to making polycentric choices with distributional consequences. Both would counsel judicial deference to the ability of the legislature and the executive to make such decisions. Finally, both dissents gravitate towards a rule-based approach to the exercise of discretion. As discussed above, the dissent in *Doucet-Boudreau* would hedge in trial judges in a manner that makes retention of jurisdiction or modification of remedies very difficult except in the rule-based context of a contempt hearing. Justice Major, in his dissent, relies heavily on the examples of cases where interim costs have been

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[100] For a decision suggesting an entitlement from the date of the enactment of s. 15 of the Charter in a case where discrimination was authorized by legislation, see *Hislop v. Canada* (2004), 234 D.L.R. (4th) 465, [2004] O.J. No. 1867 (S.C.).

[101] For cases articulating a good faith immunity, at least when the violation was authorized by statute, see *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, [2002] S.C.J. No. 13 and *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, [1996] S.C.J. No. 91.

previously awarded. The failure of the case at hand to fit into established categories would preclude the award of advance costs.

Justice Major's concern that the majority has outlined a test that is based on strong or unguided discretion has some merit. Judges applying the decision can respond to these concerns by examining the importance of hearing public interest claims, regardless of their ultimate merit, and by exploring how the purposes of the particular right claimed may support the award of advance costs. In the Aboriginal rights context, there is a strong argument that the nature of the right claimed and the relationship between governments and Aboriginal people may support the awarding of interim costs. Although the British Columbia Court of Appeal did not ground the advance cost order in section 35 or related fiduciary claims, it did consider these as important background factors that helped justify the order. Justice LeBel's judgment, however, does not discuss these background factors at any great length. In my view this is unfortunate because attention to the purpose of the right claimed can assist judges in exercising their discretion to award advance costs on a more principled basis. There may be a concern that any exploration of the right at the advance costs stage will raise concerns about prejudgment. This spectre can be dispelled by emphasizing the importance of public interest claims being heard, regardless of whether they are ultimately rejected or accepted. Courts consider the seriousness and importance of the claim and the danger of immunizing governmental actions from review when exercising their discretion to award public interest standing or to hear moot cases without any serious objection that they have unfairly prejudged the case.

In the end, *Okanagan Indian Band* is a more discordant and troubling case than *Doucet-Boudreau*. In the latter case, all the judges agreed on the relevant principles while disagreeing on their application and weight. In the former, the minority rejected the access to justice principle that was central to the majority's judgment recognizing a discretion to award advance costs in public interest litigation. At the same time, there are interesting parallels between *Okanagan Indian Band* and *Doucet-Boudreau*. The majority judgment in both cases can be defended as being grounded in general principles of justice that run the risk of degenerating into strong forms of discretion. The reasons given by trial judges in the future will be crucial in determining whether this danger can be avoided. In both cases, the exercise of discretion can be disciplined and improved by reflecting on the purposes of the Charter right at

stake, as well as the appropriate role of the court. The minority judgments in both cases take a rule-based approach that stresses common law restrictions and discounts the significance of the public and constitutional law context. The minority in *Doucet-Boudreau* discounts justice concerns related to the need for effective remedies while the minority in *Okanagan Indian Band* appears to reject concerns about access to justice altogether. Concerns about the limits of the judicial role loom large in both dissents.

IV. Delayed or Suspended Declarations of Invalidity

1. The Judgments

As discussed in the first part of this article, section 52(1) does not contemplate a discretion to suspend a declaration, but the Supreme Court has exercised this power in over 15 cases.[102] The Court's most extensive discussion of this discretion came in *Schachter v. Canada*[103] where it stressed that delayed declarations of invalidity were an extraordinary remedy that allowed an unconstitutional state of affairs to persist and interfered with the legislature by forcing a matter onto the legislative agenda. Drawing on the limited number of cases in which a suspended declaration of invalidity had been ordered to that date,[104] Lamer C.J. formulated the following "guidelines":

> Temporally suspending the declaration of invalidity to give Parliament or the provincial legislature in question an opportunity to bring the impugned legislation…into line with its constitutional obligations will be warranted *even* where striking down has been deemed the most appropriate option *on the basis of one of the above criteria if*:

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[102] Choudhry & Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies," *supra*, note 75, at 253-54; Bruce Ryder, "Suspending the Charter" (2003) 21 Sup. Ct. L. Rev. (2d) 267, at 295.

[103] *Supra*, note 5, at paras. 81-82.

[104] Even then the categories formulated in *Schachter* did not fit all the uses of a suspended declaration of invalidity to date. See *R. v. Bain*, [1992] 1 S.C.R. 91, [1992] S.C.J. No. 3 and the criticisms of the categorical approach in my *Constitutional Remedies in Canada*, *supra*, note 16, at 14.1610-14.1670.

> A. striking down the legislation without enacting something in its place would pose a danger to the public;
>
> B. striking down the legislation without enacting something in its place would threaten the rule of law; or
>
> C. the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.[105]

Although Lamer C.J. stated that these "guidelines" were not meant as "hard and fast rules", they are an exemplar of the model of rule-based discretion outlined above. The *Schachter* guidelines are based on examples of instances when a suspended declaration of invalidity would be appropriate. These examples are determinative in and of themselves. Once a court finds that an immediate declaration of invalidity would endanger the public or the rule of law, it is not realistic to explore any question other than the length of the suspension. There is not much discussion of the underlying rationales or principles that might explain why a court should or should not suspend a declaration of invalidity. The examples speak for themselves without much elaboration. The categorical approach to when suspended declarations of invalidity are appropriate in *Schachter* seems to ignore two of the main remedial principles that are articulated in that very decision to help guide the decision whether to strike an unconstitutional law or save it by a reading in remedy. Those general principles are attention to the purposes of the Charter and the role of the legislature. With respect to the former, the Court says little about how a suspended declaration relates to the purposes of the Charter or the need to ensure that the successful Charter applicant receives an effective remedy. Chief Justice Lamer seemed to reject the relevance of the principle of proper institutional function when he stated that "the question whether to delay the application of a declaration of nullity should…turn not on considerations of the role of the courts and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public."[106]

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[105] *Schachter v. Canada*, *supra*, note 5, at 719, para. 85.
[106] *Id.*, at 717, para. 83.

Since the *Schachter* guidelines were articulated in 1992, the Supreme Court has at times ignored them, often suspending declarations of invalidity without attempting to assimilate them into the three categories. This trend continued in 2003 as the Court suspended declarations of invalidity for 12 months in both *Trociuk v. British Columbia (Attorney General)*[107] and *Figueroa v. Canada (Attorney General)*[108] and for 6 months in *Nova Scotia (Workers' Compensation Board) v. Martin*.[109] The Court adverted to the *Schachter* guidelines in *Trociuk* as it concluded that an immediate declaration of invalidity would have the same effect as the nullification of underinclusive benefits because it would deprive mothers of the benefit of being able to make legitimate exclusions of the father's name on their children's birth certificates. Similarly in *Martin*, the Court reasoned that a suspended declaration of invalidity "would preserve the limited benefits of the current program until an appropriate legislative response to chronic pain can be implemented."[110] In *Figueroa*,[111] no attempt was made to apply the *Schachter* guidelines. The Court simply noted that it would suspend the declaration of invalidity for "12 months in order to enable the government to comply with these reasons."

In *R. v. Powley*,[112] the Court refused to extend a suspended declaration of invalidity ordered by the Ontario Court of Appeal, but again the decision did not focus exclusively on the *Schachter* criteria. The Court noted that the Court of Appeal had jurisdiction and discretion to suspend its declaration, but stated that "[t]his power should continue to be used only in exceptional situations in which a court of general jurisdiction deems that giving immediate effect to an order will undermine the very purpose of that order or otherwise threaten the rule of law." The idea that a suspended declaration is exceptional and preserves the rule of law and prevents chaos relates to the *Schachter* guidelines, but the idea that a suspended declaration can be used when an immediate declaration would "undermine the very purpose of that order" is a new and somewhat circular addition to the *Schachter* guidelines. The Court added that

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[107] *Supra*, note 4.
[108] *Supra*, note 4.
[109] *Supra*, note 4.
[110] *Id.*, at para. 119.
[111] *Supra*, note 4, at para. 93.
[112] *Supra*, note 6, at paras. 51-52.

it was "within the Court of Appeal's discretion to suspend the application of its ruling to other members of the Métis community in order to foster cooperative solutions and ensure that the resource in question was not depleted in the interim, thereby negating the value of the right." Concerns about promoting co-operative solutions may very well be compelling in the Aboriginal rights context,[113] but they are not captured in the three-point *Schachter* guidelines.

The most notable and controversial application of the *Schachter* criteria in 2003 was the decision of the Ontario Court of Appeal reading in the ability of same-sex couples to marry. The Court of Appeal rejected the federal government's request for a suspended declaration on the basis that "there is no evidence before this court that a declaration of invalidity without a period of suspension will pose any harm to the public, threaten the rule of law, or deny anyone the benefit of legal recognition of their marriage."[114] This was a classic rule-based approach to the exercise of discretion. The facts of the case at hand did not fit into the three categories or pigeonholes in *Schachter*, and this was taken by the Court of Appeal to be determinative without the need for any further analysis or interpretation. The refusal to suspend the declaration of invalidity in *Halpern* has been intensely controversial. On the one hand, it can be defended as based on the traditional principle of rights requiring effective, prompt, and meaningful remedies even though this principle does not feature prominently in the *Schachter* guidelines. On the other hand, it can be opposed on the basis that by creating immediate same-sex marriages, it fettered the role of Parliament in responding to the decision even though consideration of the appropriate role of legislatures and the courts is rejected by the *Schachter* guidelines. My point here is not to attempt to resolve the controversy over whether a suspended declaration of invalidity should have been issued in *Halpern*, but only to note how the mechanical application of the *Schachter* guidelines avoided discussion of the contested principles of effective remedies and

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[113] For an elaboration of how delayed declarations of invalidity may facilitate treaty-making, see my "Remedies in Aboriginal Litigation" in Magnet & Dorey, *supra*, note 27; and my "Remedies for Violations of Aboriginal Rights" (1992) 21 Man. L.J. 498. More generally, see Shin Imai, "Sound Science, Careful Policy Analysis and Ongoing Relationships: Integrating Litigation and Negotiation in Aboriginal Lands and Resources Disputes" (2003) 41 Osgoode Hall L.J. 587.

[114] *Halpern v. Canada*, *supra*, note 37, at para. 153.

proper institutional role that should have been central to whether the Court of Appeal's declaration ought to have had immediate effect or been subject to a period of suspension.

2. The Judgments and the Three Models of Discretion

The judicial approach to suspended declarations of invalidity demonstrates some of the affinities between strong forms of discretion and rule-based discretion. As discussed above, the Supreme Court in *Schachter* created a three-category rule for the use of suspended declarations of invalidity that was based on examples taken from the existing case law. Judges who follow the *Schachter* guidelines must determine whether the case at hand fits into these three categories. Sometimes, as in *Trociuk*, this process of applying the rules will require interpretation of the rule and reasoning by analogy. *Trociuk* was not a case about underinclusive benefits, but Deschamps J. for the Court determined that it was analogous to such a case because an immediate declaration of invalidity would deprive mothers of a legitimate and constitutional operation of the impugned statute, even though the law also constituted unjustified discrimination against men. This was a significant expansion of the *Schachter* guidelines,[115] but one that was based on the interpretation of the underlying rule created in *Schachter*. It did not require a sustained analysis of why a declaration of invalidity should be suspended or what effects this would have on either the successful Charter applicant or the government, but it did make the third *Schachter* category more flexible and expansive.

Figueroa stands at the other extreme as the Court simply ordered a 12-month suspension of the declaration of invalidity without any attempt to apply the *Schachter* criteria. The paucity of reasoning on this issue suggests that the Court was acting as if the decision to suspend the declaration was a matter of strong discretion. The Court in *Figueroa* could perhaps have made an effort, as it did in *Trociuk*, to fit the case into the *Schachter* categories of a threat to a rule of law or public danger

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[115] The *Schachter* guidelines applied more directly in *Nova Scotia v. Martin*, *supra*, note 4, because an immediate declaration of invalidity would have prevented eligible people from receiving workers' compensation benefits simply because the existing scheme unconstitutionally excluded those who suffered from chronic pain from receiving the benefits.

or an underinclusive benefit. It likely did not make such an attempt because the case represented an even bigger stretch of the categories than *Trociuk*. An immediate declaration of invalidity in this case would likely have caused some confusion for election officials, but it would hardly have threatened the rule of law or public safety, and it would not have deprived anyone of a legitimate and constitutional benefit. Nevertheless, the Court concluded that a suspension was appropriate in order to give Parliament time to replace the existing regime with a constitutional one and to select from among a range of constitutional options.

The use of a suspended declaration of invalidity in *Figueroa* accords with what Sujit Choudhry and I have observed elsewhere has been the largely silent evolution of the suspended declaration of invalidity "beyond its origins as an emergency measure" into "a powerful dialogic device that allows a court to remand complex issues to legislative institutions."[116] At the same time, it is striking that the Court has said so little about this evolution. This silence may also explain why the Court has yet to confront the problems created by increased use of suspended declaration of invalidity, including the potential of leaving applicants without tangible remedies in part because of the delay sanctioned by the Court[117] and in part because of the norm of legislatures amending their laws in a prospective fashion that does not address the harms of the past.[118] My point is not that the courts should return to a mechanical application of the *Schachter* categories, but rather that they should more openly recognize the complex and conflicting principles at stake.

There may be a reason why remedial discretion in this context has bounced between the extremes of rule-based and strong discretion. Rule-based discretion by its nature of relying on self-executing categories often makes discussion of the underlying rationale for the rule unnecessary. In *Schachter*, the Court went out of its way of avoiding principles when it stated that the decision to suspend a declaration "should…turn not on considerations of the role of the courts and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public."[119] Thus, the principle

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[116] Choudhry & Roach, "Putting the Past Behind Us," *supra*, note 75, at 232.

[117] See K. Roach, "Remedial Consensus and Dialogue under the Charter" (2002) 35 U.B.C.L.R. 211.

[118] Choudhry & Roach, "Putting the Past Behind Us," *supra*, note 75.

[119] *Schachter v. Canada*, *supra*, note 5, at 717, para. 83.

of proper institutional rule, as articulated and discussed by all the judges in *Doucet-Boudreau*, was put off bounds for discussion. Likewise, there was no explicit discussion of the principle of effective and meaningful remedies, again a principle that is discussed by all judges in *Doucet-Boudreau*. There is something about the certainty sought by rule- and category-based discretion that is hostile to the discussion of underlying principles that are themselves open-ended and subject to differing interpretations. It is almost as if judges applying rules or exercising strong discretion do not say too much, lest one of their colleagues disagree with them. In this sense, the suspended declaration of invalidity cases are generally unanimous decisions, whereas the more principled approach taken in cases like *Doucet-Boudreau* and *Okanagan Indian Band* produces a divided Court that does not agree on the weight or even the relevance of the competing principles.

The absence of attention to principle in rule-based discretion may promote a flight to strong discretion. Judges who find that the rules and categories, even when extended by analogical reasoning, are not appropriate may be tempted to make the leap, seen in *Figueroa*, towards strong forms of discretion. To be sure, the leap is a large one, but when judges make it they find themselves on familiar ground. In other words, both strong and rule-based forms of discretion are characterized by their neglect of underlying principles and by their ability to produce decisions that, at first glance, do not seem to invite controversy and debate. Another similarity is that both rule-based and strong discretion may be inherently unstable and unpredictable. Judges will fight the limited categories of the rules in order to achieve justice in a particular case, but the result will often be the unpredictability of strong forms of discretion that appear to be based on the will of the judges. Both forms of discretion are unsatisfying because they allow judges to make decisions that appear to be blind to important considerations about whether an effective remedy has been ordered and whether institutional roles have been respected.

The Supreme Court needs to revisit the test for suspending declarations of invalidity. The status quo of bouncing from the rule-based approach seen in *Trociuk* and *Martin* to the strong discretion of *Figueroa* in the space of less than a year is not acceptable. The controversy over the refusal to suspend the declaration of invalidity in *Halpern* also demonstrates the need to grapple with the underlying principles. Many people expected the Court of Appeal to suspend the declaration of invalidity

to give the legislature an opportunity to act and were taken by surprise when the Court of Appeal refused to do so. At the same time, the Court of Appeal cannot be criticized too harshly because it was following a rule established, but often not followed, by the Supreme Court. The prediction that the Court of Appeal would delay any declaration of invalidity in the gay marriage case avoided dealing with the *Schachter* categories and the statement in *Schachter* that concerns about appropriate institutional role should not enter into a decision whether to suspend a declaration of invalidity. Such avoidance was, of course, encouraged by the Supreme Court's own avoidance of this troublesome precedent.

An important step toward a more principled approach to suspended declarations of invalidity will be to re-evaluate both the three examples in *Schachter* and the statement that concerns about the appropriate role of courts and legislatures should not enter into the decision whether to suspend a declaration of invalidity. A minimalist reform is for the Court to follow the path of *Trociuk* and extend the three categories by analogy. Reasoning by analogy from the *Schachter* categories may reveal some more general principles which may support the specific rule. For example, the underinclusive legislation example in *Schachter* as fleshed out by *Trociuk* now seems to embrace a broader concern about the harmful effects of an immediate declaration of invalidity in preventing legitimate, needed, and constitutional uses of a law that is unconstitutional in only some of its applications. Analogies can also be made to how courts save constitutional aspects of a law by severance or by reading down or reading in. This process of reasoning could improve the *Schachter* factors and make them more flexible, but judges will still be chained by the three *Schachter* categories. Moreover, a focus on these three categories will likely fail to produce a full outline of the relevant principles that should inform remedial decision-making. For example, the principles of effective remedies and proper institutional role that were so central to *Doucet-Boudreau* are not present in the *Schachter* categories of appropriate cases to use a suspended declaration of invalidity. These general principles are not present in the *Schachter* categories even though they played a central role when the Court in *Schachter* articulated helpful and workable principles to guide judges when deciding whether unconstitutionally underinclusive legislation should be extended by a reading in remedy, or struck down.

Bruce Ryder has suggested a more maximalist reform of the *Schachter* guidelines for suspended declarations of invalidity. Professor

Ryder argues that the decision whether to suspend a declaration of invalidity should be expanded into a general balancing of interests test. The government should have a section 1-type burden to demonstrate that an immediate declaration of invalidity would "have a negative impact on the exercise of Charter rights or freedoms, or a negative impact on some other compelling social interests."[120] This proposal has the virtue of making clear that the government has to justify a suspended declaration of invalidity and of opening up the reasons for a suspended declaration of invalidity to a more open-ended list of "compelling social interests" that are important enough under section 1 of the Charter to justify a limit on Charter rights. There is also precedent in *Schachter* for looking to the developed jurisprudence under section 1 of the Charter to guide remedial decision-making. Nevertheless, the incorporation of section 1 reasoning in *Schachter* to help guide the decision whether to strike an unconstitutional law down or save it by reading in has not been entirely satisfactory. It only eliminates reading in as a remedy in cases where the objective is unconstitutional or the law is not rationally connected to the objective. This approach runs the risk of either doing too little in the many cases decided on issues of least drastic means or perhaps doing too much when, as in *Halpern*, the court appears to be sceptical about whether the objectives of the unconstitutional law are important enough to limit a Charter right. Justice La Forest, in his concurrence in *Schachter*, complained that the incorporation of section 1 reasoning could "encourage a mechanistic approach to the process, rather than encourage examination of more fundamental issues."[121]

In my view, the fundamental principles at stake in remedial decision-making are not so much section 1 considerations, but the issues of effective remedies, proper institutional role, and fairness that are discussed by all nine judges in *Doucet-Boudreau*. Under such an approach, decisions about suspended declarations of invalidity might look more like the majority judgment in *Doucet-Boudreau* where there is acknowledgement of remedial discretion, but discussion of a number of competing principles which animate the exercise of that discretion. Such an approach will not result in agreement in all cases, as witnessed by the division of the Court in *Doucet-Boudreau* about the relevant weight that

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[120] Ryder, "Suspending the Charter," *supra*, note 102, at 284-85.
[121] *Schachter v. Canada*, *supra*, note 5, at 729, para. 110.

should be given to the multiple principles in the particular context. Nevertheless, it would invite judges to give fuller reasons to justify their judicial choices and allow for the refinement of the relevant principles in a manner that has so far not occurred as courts have at various times been attracted to an application of the *Schachter* categories or a strong discretion to suspend declarations without resort to either those categories or full reasons.

What factors would guide judges under a more principled approach to the use of suspended declarations of invalidity? An important factor, and one that has been neglected in the present jurisprudence of suspended declarations, is the need to provide effective and meaningful remedies to successful Charter applicants. Judges would be encouraged to consider the anomalous position that successful Charter applicants find themselves in when they win a Charter victory only to be told that the unconstitutional law will remain valid for another 6 to 24 months. The courts should consider whether the successful Charter applicant should be exempted from the period of delay in light of the principle that successful Charter applicants should receive meaningful remedies.[122] An additional or alternative remedy in some cases might be a higher cost award to the successful Charter applicant. Courts should also consider the position of those who are in an identical position to the successful applicants, but who may not be exempted from the suspended declaration of invalidity. They can encourage the legislature to devise meaningful remedies by assuming that remedial legislation departs from the usual norm of legislation only having prospective effect. Such an approach may respond to potential inequities caused by exempting the successful Charter applicant but not others similarly situated.[123] Courts

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[122] In *Nova Scotia v. Martin*, *supra*, note 4, at para. 120, the Court held that the 6-month "postponement, of course, does not affect the appellants' cases. Mr. Martin is clearly entitled to the benefits he has been claiming, as the challenged provisions stood as the only obstacle to his claims." The Court also held that the second appellant could bring a new Charter challenge before the workers' compensation board, and "the Board will be obliged to consider and decide the issue in accordance with the present reasons." *Id.* at para. 121. This presumably would also exempt her from the suspended declaration of invalidity should this be done before the 6-month delay expired. In both cases, however, the Court failed to relate the exemption to the principle of the need to reward successful Charter applicants with meaningful remedies or consider similar claims by chronic pain sufferers whose claims would be delayed for 6 months by the suspended declaration of invalidity.

[123] See Choudhry & Roach, "Putting the Past Behind Us," *supra*, note 75.

should also address whether they will retain jurisdiction during the period of the suspension in order to minimize the damage to the Charter during the period of the suspension.[124]

An important issue for the Supreme Court to decide is whether considerations of institutional role should enter into the decision whether to suspend declarations of invalidity. Following the principled approach in *Doucet-Boudreau*, courts should in my view consider the need "to respect the relationships with and separation of functions among the legislature, the executive and the judiciary"[125] and the limits of the judicial function when deciding whether to suspend a declaration of invalidity. This would require rejection or perhaps qualification of Lamer C.J.'s dicta in *Schachter*[126] that such considerations are not relevant in deciding whether to suspend a declaration of invalidity. In some cases, it would be appropriate for courts to acknowledge that the legislature can employ a greater and more creative range of remedies than the court can. The legislature can amend more laws than are before the court. It can also devise creative new solutions to constitutional problems that would exceed even the most robust understanding of the judicial function. For example, a delayed declaration of invalidity in a case such as *M. v. H.*[127] allowed the legislature an opportunity to engage in comprehensive reform that could not be achieved even by a robust reading in remedy with respect to the impugned statute. In its response to *M. v. H.*, the Ontario legislature also created the controversial category of "same-sex partner" as an alternative to the recognition of same-sex spouses, even though it extended benefits equally to both categories. Delayed declarations of invalidity in the case of unconstitutional electoral boundaries gave the legislature the option of expanding the number of seats in the legislature in order to have manageable ridings in the north and other remote areas whereas even the most intrusive judicial remedy would only require the boundaries to be redrawn within the existing number of seats.[128] Delayed declarations of invalidity can

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[124] See Roach, "Remedial Consensus and Dialogue under the Charter," *supra*, note 117.
[125] *Doucet-Boudreau*, *supra*, note 1, at para. 56.
[126] *Schachter*, *supra*, note 5, at para. 83.
[127] [1999] 2 S.C.R. 3, [1999] S.C.J. No. 23.

number of seats.[128] Delayed declarations of invalidity can allow legislatures to enact remedies that the court alone could not enact.

As recognized by L'Heureux-Dubé J. in *Corbiere v. Canada*,[129] suspended declarations of invalidity can allow governments to consult with those affected by the remedies and "[c]onstitutional remedies should encourage the government to take into account the interests, and views, of minorities." The government can take the time provided by the delayed declaration to engage in consultation with the minorities intended to benefit from the remedy to determine how their priorities, needs, and aspirations should affect the remedy.[130] The government can also consult with others who are affected by the remedy and who may play a role in determining whether it will be effective, in order to determine that the remedy does not "impose substantial hardships that are unrelated to securing the right."[131]

A principled approach to suspended declarations can also recognize what has frequently been described as a partnership or a dialogue between the courts and legislatures, in which the two institutions play distinct and complementary roles. A recognition of a remedial dialogue or partnership would also accord with McLachlin C.J.'s recognition in her extra-judicial writings that delayed declarations of invalidity are a Canadian innovation that can facilitate judicial and legislative cooperation.[132] At the same time, it can be argued that dialogue can occur with or without delayed declarations of invalidity. Parliament responded to *Schachter* by reducing the period of parental leave not when the Supreme Court issued a delayed declaration of invalidity, but rather when lower courts read in biological parents into parental leave benefits de-

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[128] *Dixon v. British Columbia (Attorney General)* (1989), 59 D.L.R. (4th) 247, [1989] B.C.J. No. 583 (S.C.). On the response to this case, see my "Reapportionment in British Columbia" (1990) 24 U.B.C. L. Rev. 79.

[129] *Corbiere v. Canada*, *supra*, note 32, at paras. 116, 117. On the actual results of the delayed declaration in *Corbiere*, see my "Remedial Consensus and Dialogue," *supra*, note 117, at 242-52.

[130] For an argument about the relevance of the needs of those who are supposed to benefit from a remedy to devising the remedy, see my "The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies" (1991) 33 Ariz. L. Rev. 859.

[131] *Doucet-Boudreau*, *supra*, note 1, at para. 58.

[132] Beverley McLachlin, "The Charter: A New Role for the Judiciary" (1991) 29 Alta. L. Rev. 540, at 555*ff*; Beverley McLachlin, "The Role of the Court in the Post-Charter Era: Policy-Maker or Adjudicator?" (1990) 39 U.N.B.L.J. 43, at 63.

signed for adoptive parents. The federal government and many provinces responded to *M. v. H.* with new legislation even though it was only Ontario that was subject to the delayed declaration of invalidity. It must be acknowledged that the legislature can exercise its legislative function with or without a suspended declaration of invalidity.[133]

Nevertheless, a delay can serve the important purpose of prompting the government to address the issue. It fits into a pattern of dialogic democracy in which the courts place issues concerning the treatment of rights onto the legislative agenda when the legislature might otherwise wish to avoid the issue or leave the status quo in place. The dissenters in *Doucet-Boudreau* would likely object to a democracy forcing justification for suspended declarations of invalidity. They might well argue that such a remedy would be designed to "put … pressure on the government to act. This kind of pressure is paradigmatically associated with political actors."[134] In my view, this is too absolutist a view of the separation of powers. An inflexible rule against considering institutional role when suspending a declaration of invalidity does not fit the many cases in which the courts have used delayed declarations as a way of remanding complex issues back to the legislature.[135]

An immediate declaration of invalidity, or indeed creative reading in remedies,[136] may sap democracy by creating the impression that courts are capable of solving all of society's constitutional problems without requiring legislators to rethink their decisions in light of the court's rulings. An immediate declaration of invalidity may also create entitlements that will unduly constrain the range of legislative choices.[137] Although he is generally sceptical about dialogic uses of delayed declarations of invalidity, Professor Ryder recognizes that an immediate

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[133] Ryder, "Suspending the Charter," *supra*, note 102, at 280-81.

[134] *Doucet-Boudreau*, *supra*, note 1, at para. 128.

[135] *Corbiere v. Canada*, *supra*, note 32; *Dunmore v. Ontario (Attorney General)* (2001), 207 D.L.R. (4th) 193 (S.C.C.), [2001] S.C.J. No. 87. See also, *Gosselin v. Quebec (Attorney General)* (2002), 221 D.L.R. (4th) 257, at para. 293 (S.C.C.), *per* Bastarache J. in dissent, [2002] S.C.J. No. 85.

[136] *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, [2004] S.C.J. No. 6, at paras. 190-92, *per* Arbour J. in dissent.

[137] *R. v. Guignard*, [2002] 1 S.C.R. 472, [2002] S.C.J. No. 16 (wide-open advertising could create entitlements in property law); *Halpern v. Canada*, *supra*, note 37 (same-sex marriages could not be undone even by use of the s. 33 override, which only applies prospectively).

declaration of invalidity could "narrow the range of practical options to the democratically accountable branch of government" and that a suspended declaration could be justified in some cases on the basis that it "would respect the primacy of the legislature's law-making role."[138] A judge may, subject to other factors such as the need to ensure an effective and meaningful remedy, be justified in suspending a declaration of invalidity in order to allow the legislature an opportunity to exercise the full range of constitutional processes and options in responding to the court's finding that the existing law is unconstitutional.

It is not clear whether the Court will accept the relevance of institutional or dialogic factors in determining whether a suspended declaration of invalidity is appropriate. As discussed above, Lamer C.J. rejected the relevance of such considerations in *Schachter*. More recently, the majority judgment in *Doucet-Boudreau* demonstrated some discomfort with the metaphor of dialogue. Justices Iacobucci and Arbour stated that "judicial restraint and metaphors such as 'dialogue' must not be elevated to the level of strict constitutional rules to which the words of section 24 can be subordinated."[139] It is difficult to know whether this is something of an aside or a rethinking of previous uses of the dialogue metaphor by the Court. The Court's invocation of the dialogue metaphor has not been consistent with some judges using dialogue as a principle for deference to legislative replies and others using it as a justification for striking down a law.[140] More fundamentally, the Court has used dialogue in different ways, sometimes suggesting that it represents the idea that courts can add something to social and political debates that would not otherwise be present or fully heard, and on other occasions suggesting dialogue can result in the courts' and legislatures' holding each other accountable, or that dialogue encourages the legislature to act on an interpretation of the Charter that differs from that of the Court.[141]

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[138] Ryder, "Suspending the Charter," *supra*, note 102, at 285-86.

[139] *Doucet-Boudreau*, *supra*, note 1, at para. 53.

[140] See my "Dialogic Judicial Review and its Critics" (2004), 23 Sup. Ct. L. Rev. (2d) 49 assessing the inconsistent use of the dialogue metaphor in *R. v. Hall*, [2002] 3 S.C.R. 309, and *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, [2002] S.C.J. No. 66.

[141] See my "Constitutional and Common Law Dialogues" (2001) 80 Can. Bar Rev. 481, on different understandings of dialogue implicit in the Court's use of the metaphor in *R. v. Mills*, [1993] 3 S.C.R. 668.

In my view, the dialogue metaphor is most useful to describe the constitutional theory implicit in the Charter and other modern bills of rights that allow ordinary legislation enacted by democratically elected legislatures to limit or derogate from rights as interpreted and enforced by the independent judiciary. The concept of dialogue and the related concept of respect for institutional role should play a role in the remedial decisions of the court. Canadian courts have often relied on general declarations to allow both the executive and the legislature flexibility to play their role in selecting the precise means to honour constitutional obligations.[142] Delayed declarations of invalidity can allow the legislature an opportunity to select from among the widest range of constitutional options, including the full range of legislative options under sections 1 and 33 of the Charter. Although some assert that legislation cannot be a remedy, Canada in fact has a long history of remedial legislation.[143] Given its central role in *Doucet-Boudreau* and indeed in that part of *Schachter* that relates to the choice between reading in and striking down as a remedy, the idea that respect for the respective roles of courts and legislatures should never enter into the decision whether to suspend a declaration of invalidity is not sustainable. That does not mean, however, that this principle will be interpreted in the same way by all judges or that it is the exclusive or necessarily the weightiest principle in remedial decision-making.

V. CONCLUSION

Remedial discretion is an important feature of the Charter. It is needed to ensure effective enforcement of the Charter, but it must also be conceptualized in a manner that makes it part of the Charter. One approach is to conceptualize it as a strong discretion that gives trial judges much freedom and restrains appellate courts from interfering. This approach is not consistent with the idea that people have rights to remedies, and the emphasis on rational explanation and principled reasoning when interpreting Charter rights and when deciding whether limits on Charter rights have been justified. Dissenting judges in both

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[142] *Mahe v. Alberta*, *supra*, note 42; *Eldridge v. British Columbia*, *supra*, note 98.

[143] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, ss. 93(3) and (4).

Doucet-Boudreau and *Okanagan Indian Band* expressed concerns that the Court was sanctioning strong discretion or an unpredictable "judicial *carte blanche*"[144] in devising remedies under section 24(1) and awarding interim or advance costs in public interest litigation. The greatest danger of strong remedial discretion is seen in a case such as *Figueroa*, in which the Court exercises a discretion to suspend a declaration of invalidity without giving real reasons for why it is doing so. The flip side of strong discretion is seen in cases such as *Schachter* in which the Court articulates three categories that purport to outline all the circumstances in which a suspended declaration of invalidity is appropriate. All that judges need do then is decide whether the case at hand fits the categories. A more sophisticated approach to rule-based discretion was taken in *Trociuk* when the Court interpreted the *Schachter* categories and extended them by analogy. If strong discretion is under-governed by law, rule-based discretion is over-governed in the sense that judges have little freedom to devise and justify new remedies in response to new rights and new circumstances. The main weakness of both strong and rule-based discretion is that they allow judges to make momentous remedial decisions with inadequate attention to principles and with inadequate reasons.

A principled approach to remedial decision-making attempts to make the exercise of remedial discretion more consistent with the approach taken to the interpretation of the rest of the Charter. The key to principled remedial decision-making is not that a right answer will magically appear, but that the judges and parties can reach some tentative agreement on the relevant principles and then debate the scope and relative weight of each principle in the particular context. This is what occurred in *Doucet-Boudreau* even though the Court split 5:4 over what principle was most important. The majority stressed the need for effective and meaningful remedies in the context of a chronic violation of section 23 of the Charter and the minority stressed the competing principle of appropriate institutional role. At the same time, the majority in *Doucet-Boudreau* did not ignore the principles of proper institutional role and fairness to the governmental defendants, and the minority attempted to argue that its approach was consistent with remedial effectiveness. *Doucet-Boudreau* is a positive sign in the development of

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[144] *Doucet-Boudreau*, *supra*, note 1, at para. 147.

remedies under the Charter because all the judges agreed on the relevant principles, even though at the end of the day they did not agree on what those principles required and which were most important in the particular case. Nevertheless, the decision has provided a principled framework for the future.

Okanagan Indian Band is a more troubling case because the judges did not agree about what principles should inform a trial judge's discretion to order interim or advance costs. The majority stressed the principle of access to justice while the minority restricted advance costs to cases decided under the prior common law. The majority itself could have made its decision more principled by stressing the importance to the public interest of hearing claims of Aboriginal rights while not prejudging the particular case. The suspended declaration of invalidity cases are the most troubling as they avoid examination of principles such as the need for effective remedies and the need to respect institutional role, and haphazardly bounce back and forth from a categorical rule-based approach to a strong discretion approach. Principled remedial decision-making is no recipe for agreement, but it should, as it did in *Doucet-Boudreau*, produce a more wide-ranging and substantive debate about the best way to exercise remedial discretion.